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IN THE

Supreme Court of the United States

October Term, 1991

GARY GRAHAM,
Petitioner,
v.
JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER GARY GRAHAM

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On Writ of Certiorari to the
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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER GARY GRAHAM

INTEREST OF *AMICUS CURIAE*

Miguel A. Richardson, the petitioner in *Richardson* v. *Texas*, No. 91-6745, now pending before this Court, respectfully submits this brief *amicus curiae* in support of Gary Graham's

appeal. Both counsel for Petitioner and Respondent have consented to the filing of this brief.

Richardson, like petitioner Graham, urges this Court to clarify and reaffirm the constitutional principles embodied in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Penry* v. *Lynaugh*, 487 U.S. 1233 (1988), and to reject the similar misinterpretation and misapplication of *Penry* by the Fifth Circuit (in the instant case) and the Texas Court of Criminal Appeals (in Richardson's case). Both courts were sharply divided over similar (although not identical) issues of how to apply this Court's ruling in *Penry* to mitigating evidence quite different from the mental retardation and childhood abuse presented in *Penry*.

Like Gary Graham, Miguel A. Richardson was sentenced to death under the former Texas capital sentencing statute, which unconstitutionally precluded juries from considering and giving effect to mitigating evidence as required by the Eighth Amendment. *See Penry*, *supra*. The Texas Court of Criminal Appeals affirmed Richardson's death sentence on October 28, 1987, 744 S.W.2d 65, and he timely petitioned this Court for a writ of certiorari. This Court held that petition for the entire October 1988 term, while it considered *Penry*. Following its decision in *Penry*, this Court *granted certiorari*, remanding to the Texas Court of Criminal Appeals for further consideration in light of *Penry*. *Richardson* v. *Texas*, 492 U.S. 914 (1989). That court nevertheless reaffirmed Richardson's death sentence, in a 4-3 decision. Richardson again petitioned this Court for certiorari (No. 91-6745), and on June 8, 1992, this Court granted certiorari in the instant case, 60 U.S.L.W. 3827 (1992), and held Richardson's petition while it considers this case.

Richardson respectfully urges reversal of the Fifth Circuit's decision herein, in terms that will make clear to the Texas Court of Criminal Appeals that the majority opinion in his case misapplied *Penry* in much the same way as the Fifth Circuit majority did here. Indeed, the virtues of consistency and judicial economy suggest that, upon reversing the judgment herein, the Court should also grant Richardson's petition and summarily reverse and remand for a new trial, rather than ordering still

another round of reconsideration by the Texas Court of Criminal Appeals.

BACKGROUND

The mitigating evidence presented at Richardson's sentencing trial depicted a multi-faceted individual whom rational jurors might have found deserving of a life sentence, rather than death. Richardson presented five categories of mitigating evidence, some of which mirror the mitigating evidence before this Court in the instant case, which were either not relevant to the Texas special issues, or were relevant beyond the scope of those issues. Thus, like Graham, Richardson presented evidence of sincere religious devotion and strong family ties, including the testimony of four ministers and his Sunday school teacher, and evidence of voluntary service and kindness to others, including testimony about how he significantly helped a young girl with serious medical problems and suicidal tendencies. In addition, Richardson presented evidence of unusual artistic and poetic talent, and of a troubled youth leading to emotional and mental impairment, including the effects of racial tensions in the Oklahoma City schools and an abusive household that he was compelled to leave at an early age. Like Graham, Richardson did not receive a special instruction of the kind mandated by *Penry*, explaining how the jury could give effect to these mitigating factors in reaching its sentencing decisions. And like Graham in the Fifth Circuit, Richardson found his death sentence reaffirmed even after *Penry*, via a majority decision which erroneously restricted the rule of *Penry*, as we now show.

SUMMARY OF ARGUMENT

This Court, in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), articulated a simple and straightforward test for applying the constitutional requirement of individualized sentencing. That test had been dictated by this Court's earlier decisions in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982). This Court's clear bright-line *Penry* rule has been occluded by the Fifth Circuit in the instant case, *see* 950 F.2d

1009 (5th Cir. 1992) (*en banc*), and by the Texas Court of Criminal Appeals in *Richardson* v. *Texas*, 1991 WL 99949 (Tex. Crim. App. June 12, 1991) (en banc), both of which have added several additional unwieldy requirements to the simple *Penry* test. Both decisions erroneously introduced subjective standards of review, and injected an improper, time-consuming "re-weighing" of the facts and circumstances surrounding each case, inconsistent with the *Penry* holding and, in part, inconsistent with this Court's rationale in *Boyde* v. *California*, 484 U.S. 370 (1990). In contrast, the consistent application of *Penry* by the Oregon Supreme Court without these constrictive glosses has led to reversal of death sentences in circumstances indistinguishable from Graham's and Richardson's.

ARGUMENT

THE TEXAS COURT OF CRIMINAL APPEALS AND THE FIFTH CIRCUIT HAVE BOTH *OBSCURED THE SIMPLE PENRY TEST*

The rule of *Penry* is very simple. It requires a supplemental instruction under the former Texas sentencing statute *whenever* the defendant introduces evidence about "his background or character or the circumstances of the crime" that is *either* (1) "not relevant to the special verdict questions," *or* (2) "has relevance to the defendant's moral culpability *beyond the scope* of the special issues." Such an instruction is necessary to alert the jury that they may consider and give effect to such mitigating evidence and its ultimate impact on their "reasoned moral response" regarding the defendant's sentence. *Penry*, 492 U.S. at 321, 323. Absent such instruction, the Eighth Amendment mandates resentencing before a properly instructed jury.

Both the Texas Court of Criminal Appeals in *Richardson* and the Fifth Circuit in *Graham*, apparently believing that they must constrict *Penry* in order to avoid conflict with *Jurek* v. *Texas*, 428 U.S. 262 (1976), have created and superimposed several unwieldy requirements on this Court's simple *Penry* test. *Richardson*, 1991 WL 99949, at *3; *Graham*, 950 F.2d at 1017.

First, both courts have usurped the jurors' role of weighing the sufficiency of the mitigating evidence presented. The Fifth Circuit in *Graham* did so by requiring that, before a *Penry* instruction must be given, the evidence must have "*major* mitigating thrust" which extends "*substantially* beyond the scope of all the special issues." 950 F.2d at 1027 (emphasis added). Likewise, the Texas Court of Criminal Appeals, while conceding that evidence of artistic and poetic talent could require a *Penry* instruction under different circumstances, superimposed upon *Penry* a new requirement of "evidence demonstrating *lifelong dedication* to the arts or poetry in order to *gain status* as Eighth Amendment mitigating evidence." *Richardson*, 1991 WL 99949, at *3 (emphasis added). Likewise, it relied on its own weighing of the evidence of Richardson's voluntary service and kindness to others, holding that there was no need for a *Penry* instruction because it found that the evidence failed to show "lifelong qualities" of Richardson's. *Richardson*, 1991 WL 99949, at *2-3. Finally, it dismissed Richardson's evidence of religious commitment, finding that it failed to support "any *significant* religious devotion, of the *character* and *quality*, that would entitle appellant to a *Penry* instruction." *Id.* at *5 (emphasis added).

Under this Court's decisions from *Lockett* and *Eddings* right through *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988), and *Penry*, such conclusions about the *quality* and *weight* of the evidence are clearly within the exclusive province of a jury, not an appellate court. Nowhere in *Penry* did this Court establish a "threshold that mandates a *Penry* instruction." *Richardson*, 1991 WL 99949, at *5. On the contrary, this Court held that the trial judge's instructions must permit the jury "to consider and give effect to *any* mitigating evidence relevant to a defendant's background and character or the circumstances of the crime" and that "full consideration of evidence that mitigates against the death penalty is essential . . . ." *Penry*, 492 U.S. at 328 (emphasis added). This mandate recognizes that it is the "whole picture, the whole ball of wax," *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), rather than a single feature of the defendant's character or background, that often convinces reasonable jurors to spare a defendant's life.

Second, both the Fifth Circuit and the Texas Court of Criminal Appeals created a new threshold requirement, not required by *Penry*, that the mitigating condition be "permanent" in order to mandate a *Penry* instruction. As noted, in Richardson's case, the Texas court denied the need for a *Penry* instruction because it found that the evidence failed to show that Richardson's kindness and religious devotion were "lifelong qualities". *Richardson*, 1991 WL 99949, at *2-3, *5. Similarly, in the instant case, the Fifth Circuit declined to apply *Penry* to mitigating circumstances, such as youth, which were clearly subject to change with time. *Graham*, 950 F.2d at 1031; *id.* at 1034 (Reavley, J., dissenting) ("[the majority] holds that no instruction or jury decision is needed for transitory circumstances of mitigation"). Such a requirement of "permanence" finds no support in *Penry*, and constricts the jurors' opportunity to freely and fully evaluate mitigating evidence in reaching a "reasoned moral response."

Finally, and most importantly, both courts failed to recognize that evidence relevant to one or more of the special issues may have additional relevance beyond the scope of those questions. Both the Fifth Circuit and the Texas court overlooked what this Court made so clear in *Penry*—that the relevance of a particular mitigating circumstance to one or more of the special issues does not necessarily exhaust its relevance to a rational juror's conclusion about the appropriateness of a death sentence. If there is mitigating evidence which is relevant "beyond the scope of" the special issues, then a *Penry* instruction is still required. Thus, Graham's youth and troubled childhood had relevance to his ability to act deliberately (Special Issue Number One), because they made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry*, 492 U.S. at 322-23. But this evidence also had relevance beyond Special Issue Number One, because a juror could have believed that Graham acted deliberately, but still concluded, based on the evidence of youth and a troubled childhood, that Graham does not deserve to die.

By the same token, Richardson presented evidence of artistic and poetic talent, religious devotion, and acts of

kindness, some of which covered the period after his incarceration. But the Texas court found that evidence relevant *only* to Special Issue Number Two, refusing to acknowledge that it could affect a jury's "reasoned moral response" *beyond* its tendency to show lack of future dangerousness. *Richardson*, 1991 WL 99949, at *2-3, 5. Jurors could have found that Richardson had a propensity for future violence, while also finding, in the evidence of his capacity for kindness, faith, and creating works of art, a sufficient reason to spare his life. This Court has expressly recognized this point before. In *Boyde* v. *California*, 494 U.S. 370 (1990), this Court observed that mitigating evidence of "artistic ability" was *not* necessarily introduced to demonstrate that a defendant is a "model prisoner . . . and therefore unlikely to present a risk of future dangerousness," but rather "as part of petitioner's overall strategy to portray himself as *less culpable* than other defendants due to his disadvantaged background *and his character strengths in the face of those difficulties*." (*Id.* at 382-83 n.5; emphasis added.)[1/]

Moreover, Richardson's evidence of a troubled and abused childhood was precisely the kind of "two-edged sword" identified in *Penry*: "it may diminish [a defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Penry*, 492 U.S. at 324. Special Issue Number Two permitted this two-edged sword to cut only one way: Richardson's evidence could arguably have supported an affirmative answer to Special Issue Number Two, but the jury could not give effect to the intuitively mitigating quality of the same evidence.

The constricted application of *Penry* which has sharply divided both the Fifth Circuit and the Texas Court of Criminal Appeals has not infected the only other appellate court charged with interpreting and applying *Penry*—the Supreme Court of

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[1/] In *Boyde*, "factor (k)" of the California jury instructions—in contrast to the Texas special issues—*permitted* the jury to give "independent mitigating weight" to such "character strengths" wholly apart from a defendant's propensity for future violence.

Oregon. After deciding *Penry*, this Court remanded *Wagner* v. *Oregon*, 492 U.S. 914 (1989) to that court for further consideration. The record in *Wagner* contained mitigating evidence concerning the defendant's mental instability and suicide attempts, employment efforts, artistic ability, above-average intelligence, and relative youth—which at least one judge of the Oregon court found "sparse," but nevertheless should have been considered by the jury. *State* v. *Wagner*, 305 Or. 115, 752 P.2d 1136 (1988) (Gillette, J., dissenting).

Unlike the Texas court and the Fifth Circuit, the Oregon court, on remand, unhesitatingly found itself "compelled to vacate the judgment that affirmed the sentence of death" and to remand for resentencing—without any attempt to narrow or redefine the simple directive of *Penry*, or to usurp the jurors' function of weighing the sufficiency of the evidence, or to create any threshold test of "permanence." *State* v. *Wagner*, 305 Or. 5, 786 P.2d 93, *cert. denied*, 111 S. Ct. 212 (1990). And that court has continued its straightforward interpretation of *Penry* in subsequent capital cases. *See State* v. *Moen*, 309 Or. 45, 786 P.2d 111 (1990); *State* v. *Farrar*, 309 Or. 132, 786 P.2d 161, *cert. denied*, 111 S. Ct. 212 (1990); *State* v. *Miranda*, 309 Or. 121, 786 P.2d 155, *cert. denied*, 111 S. Ct. 212 (1990).

CONCLUSION

This Court should squarely address and remedy the misapplication of *Penry* by the Fifth Circuit and the Texas Court of Criminal Appeals. The instant case affords this Court an opportunity to reaffirm the simple *Penry* test, and thus reverse both Graham's and Richardson's sentences.[2/]

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Respectfully submitted,

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[2/] Nevertheless, should this Court affirm in the instant case, it should still grant certiorari to review Richardson's conviction and sentence for all the reasons discussed in his still-pending petition for certiorari.